In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-420

RUDY MONTANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner and co-defendant Griffin were convicted of conspiracy to import heroin into the United States, in violation of 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for fifteen years. The court of appeals affirmed in a comprehensive opinion on July 5, 1972 (Pet. App. A 1-9) and a petition for rehearing was denied on August 9, 1972 (Pet. App. B). The petition for a writ of certiorari was not filed until September 12, 1972, and is therefore out of time under Rule 22(2) of

this Court's Rules. In any event, the petition presents no issue warranting review by this Court.

Petitioner contends that he was prejudiced by the fact that the indictment charged only one conspiracy, but the proof established (as the court below found) five separate conspiracies. This same contention was raised by co-defendant Griffin in his petition in No. 72-5182. We rely on our discussion of the issue in our Memorandum in Opposition in that case [1] as well as on the analysis of the court below as showing why any variance was not prejudicial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[1] We are providing petitioner's counsel with a copy of our Memorandum in Opposition in No. 72-5182.

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